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Mortgages--Effect of Wrongful Demand for Rent by Receiver (Nerwal Realty Corp. v. 9th Avenue--31st Street Corp., et al., N.Y.L.J., February 25, 1935)

St. John's Law Review

disagree as to what is reasonable cause.[11] The reasonableness of the objection may be tested by motion for an injunction.[12]

The courts have not attempted to define the degree of proof of materiality necessary to sustain the subpoena under the statute. It is submitted that in order to carry out the intent of the legislature in the light of the remedy it has attempted to supply and in order not to unduly hamper the Attorney-General in his investigations, the burden should be placed on the petitioner to prove the obvious irrelevancy of the information demanded or the inevitability of failure to discover anything material to the investigation.[13]

J. E. H.

MORTGAGES—EFFECT OF WRONGFUL DEMAND FOR RENT BY RECEIVER.—Landlord and tenant entered into a long term lease under which the latter was to pay the rent for the first year in advance. After the tenant was in possession for several months, a suit was brought to foreclose a mortgage to which the lease was subordinate. A receiver was appointed. He demanded of tenant, as rent, the value for the use and occupation of the premises and, upon being refused, obtained an order of the court to evict tenant. The latter, accepting eviction, constructively vacated by giving up his rights under the lease and thereafter entered into a new lease with the receiver. Plaintiff, successor to the rights of the mortgagee, moved to set aside the order to vacate on the ground that the court had no jurisdiction to grant said order. The plaintiff seeks to restore the *status quo* under the old lease. *Held,* .the receiver's wrongful demand for rents and tenant's subsequent vacating of possession terminates the lease leaving parties open to negotiate a new contract.

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[11] *Ibid.*

[12] Dunham v. Ottinger, *supra* note 2. It has been held that the court has no jurisdiction to question the validity of a subpoena issued under the statute on petition alone. The proper procedure is an action for injunctive relief. Matter of Marcus, Matter of Horvatt, both *supra* note 3.

[13] Cardozo, C. J., discussed the problem in the case of *In re* Edge Ho Holding Corporation, 256 N. Y. 374, 176 N. E. 537 (1931): "The powers devolved * * * will be rendered to a large extent abortive if his subpoenas are to be quashed in advance of any hearing at the instance of unwilling witnesses upon forecasts of the testimony and nicely balanced arguments as to its probable importance. Very often the bearing of information is not susceptible of intelligent estimate until it is placed in its setting, a tile in the mosaic. Investigation will be paralyzed if arguments as to materiality or relevance, however appropriate at the hearing, are to be transferred upon a doubtful showing to the stage of a preliminary contest as to the obligation of the writ. Prophecy in such circumstances will step into the place that description and analysis may occupy more safely. *Only where the futility of the process to uncover anything legitimate is inevitable or obvious must there be a halt upon the threshold.*" (Italics writer's.)

Nerwal Realty Corp. v. *9th Avenue–31st Street Corp., et al.*, N. Y. L. J., February 25, 1935.

A Court of Equity has power to appoint a receiver as an incident to its jurisdiction and such power is not dependent on any statute.[1] The receiver has the right to collect the rent in advance, pending the judgment by the court in the foreclosure action and the sale which transfers ownership to the purchaser.[2] The court cannot, however, pending such transfer of ownership, terminate the rights of the mortgagor under leases made by him or the rights of tenants to the use and occupancy of the premises for a stipulated rental, so long as their lessor's title has not been divested.[3]

Where a tenant has paid rental in advance, as per his contract with the mortgagor, he cannot be compelled to pay occupational rent.[4] A tenant covenants for the right of quiet enjoyment,[5] and upon eviction, actual or constructive, the covenant is broken.[6] A wrongful demand for rent, as in the case at bar, is such eviction,[7] and where a tenant is required to pay for use and occupation a sum beyond the rents reserved in the lease to him, the necessary effect of an order requiring it to pay for such use and occupation is to free it from further obligation under its lease and constitutes a disaffirmance of the lease.[8] Therefore, the lease being terminated, the tenant was free to negotiate a new lease with the receiver.

A. S. G.

PROCESS—DELIVERY OF SUMMONS TO SHERIFF FOR SERVICE—SERVICE THEREOF BY INDIVIDUAL.—Plaintiff sued on a fire insurance policy. The summons was delivered to the sheriff for service upon defendant, pursuant to Civil Practice Act §17[1] within the time lim-

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[1] Hollenbeck v. Donnell, 94 N. Y. 342 (1884); United States Trust Co. v. N. Y. *etc.* R. Co., 101 N. Y. 478, 5 N. E. 316 (1886); Decker v. Gardner, 124 N. Y. 334, 26 N. E. 814 (1891).

[2] Keeney v. Home Ins. Co., 71 N. Y. 396 (1877); Prudence Co., Inc. v. 160 W. 73d Street, 260 N. Y. 205, 183 N. E. 365 (1932); Markantonis v. Madlan Realty Corp., 262 N. Y. 354, 186 N. E. 862 (1933).

[3] *Ibid.*

[4] *Ibid.*

[5] Mygatt v. Coe, 147 N. Y. 456, 62 N. E. 17 (1895).

[6] Scriver v. Smith, 100 N. Y. 471, 3 N. E. 675 (1885); Shattuck v. Lamb, 65 N. Y. 499 (1875).

[7] Giles v. Comstock, 4 N. Y. 270 (1850).

[8] Markantonis v. Madlan Realty Corp., *supra* note 2.

[1] N. Y. CIVIL PRACTICE ACT (1920) §17:

"An attempt to commence an action * * * is equivalent to the commencement thereof against each defendant, within the meaning of each provision of this act which limits the time for commencing an action, when the summons is delivered, with intent that it shall be actually